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No. 06-6911

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

Respondent rests its argument on the plain meaning of the word "restored." But reciting the definition of "restored" from five separate dictionaries does not, as Respondent hopes, dispose of the issue. The word "restored" considered alone cannot answer the question before the Court. Nor is it answered by repeated explanations that "retained" does not have the same meaning as "restored." Rather, the question is whether the exemption clause should be interpreted to exclude convictions for which civil rights were retained or for which some were restored and some were retained. While the language of the statutory text is the starting point of the Court's analysis, it does not end there. The Court will look outside the plain language when that language leads to absurd consequences that Congress could not possibly have intended. See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 470-71 (1989) (Kennedy, J., concurring). Additionally, the Court must read the provision in the context of "the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis." *Dolan* v. *USPS*, 546 U.S. 481, 486 (2006). Respondent fails to contradict Petitioner's contention that excluding convictions for which civil rights were retained is absurd with any argument that has not already been rejected by this Court. In the end, Respondent's vigorous defense of the word "restored" rings hollow in light of the common sense application of the statute as informed by this Court's precedent, the legislative history of FOPA, and the surrounding statutory provisions.

I. A SENSIBLE READING REQUIRES THE INCLUSION OF CONVICTIONS FOR WHICH CIVIL RIGHTS WERE RETAINED.

The term "crime punishable by imprisonment for a term exceeding one year" defines a predicate conviction for purposes of the federal firearms statute. 18 U.S.C. § 921(a)(20) (2006). It is meant to identify dangerous

individuals who should be subject to the federal firearms prohibition and increased penalties. See *Small* v. *United States*, 544 U.S. 385, 390 (2005). Section 921(a)(20)(B), for example, specifies that state *misdemeanors* punishable by two years or less do not make a person dangerous for purposes of federal law and excludes outright such convictions. Respondent argues that Petitioner's interpretation of the exemption clause encompasses essentially the same inquiry as § 921(a)(20)(B). Resp. Br. 15-16. This contention is both factually and conceptually misplaced. Not all misdemeanors punishable by more than two years result in a loss of civil rights. See *e.g.*, NACDL App. 1 at 24, 33 (citing Maryland and Wisconsin). Under § 921(a)(20), more importantly, subsection (B), the exemption clause and the unless clause are each a distinct step in determining what counts as a conviction for purposes of the federal firearms statute. Even if a state misdemeanor conviction is punishable by more than two years, § 921(a)(20) exempts that conviction if both the exemption clause and unless clause are satisfied.

Respondent argues that "if the States' general trustworthiness determinations controlled who could possess firearms under federal law, the federal prohibition would be at most 'a sentence enhancement' for the violation of state-law prohibitions against possession of firearms — 'a result inconsistent with . . . congressional intent,' as this Court recognized in *Caron*." Resp. Br. 18 (alteration in original). But Respondent blurs the inquiries of the exemption clause and unless clause. Petitioner is not attempting to "substitute" a general "trustworthiness" rationale for the text of § 921(a)(20). Such a general trustworthiness rationale would simply rely on whether an offender is allowed to possess a firearm under state law. Clearly, § 921(a)(20) requires more.

The exemption clause includes convictions that have been expunged or set aside or for which a person has been pardoned or has had civil rights restored. 18 U.S.C. § 921(a)(20). Justice Thomas' uncontroverted description of

the import of restoration of civil rights was that "[i]n restoring those rights, the State has presumably deemed such ex-felons *worthy of participating in civic life.*" *Caron* v. *United States*, 524 U.S. 308, 318 (1998) (Thomas, J. dissenting) (emphasis added). Justice Thomas thus acknowledged that the exemption clause's inquiry is a *state-based* one. In fact, the majority also acknowledged that, unlike the unless clause where federal law imposes its own broader stricture, state law controls the exemption clause and restorations of civil rights in particular. *Id.* at 316. Thus, with regard to the exemption clause, the inquiry *only* takes place at the state level. See also *Beecham* v. *United States*, 511 U.S. 368, 371 (1994).

Furthermore, the subject of the inquiry is whether a state deems a person *worthy of participating* in civic life. Of import here, the exemption clause hinges on whether, despite otherwise qualifying as a conviction under § 921(a)(20)(B), a state allows an offender to participate fully in civic life. Petitioner's reading of the exemption clause gives effect to the state's rule in making this determination by asking whether the state deems an offender worthy of participating in civic life, not only whether there has been an affirmative act of forgiveness at a later time. See *United States* v. *Indelicato*, 97 F.3d 627, 630 (1st Cir. 1996) ("[t]o key the federal statute to these civil rights makes sense only on one assumption: that Congress thought of the attribution of these rights as expressing 'a state's judgment that a particular person or class of persons is, despite a prior conviction, sufficiently trustworthy to posses firearms.'") (quoting *McGrath* v. *United States*, 60 F.3d 1005, 1009 (2d Cir. 1995)). The process by which an offender is allowed to participate is irrelevant — participation alone is the touchstone.

This Court's analysis of the unless clause in *Caron* informs the understanding of the proper application of the exemption clause. In *Caron*, the Court confronted the question of whether, for purposes of the federal statute, a state has expressly provided that a person may not possess firearms if

the state only partially banned a person's firearms right. The Court decided that because the state imposed a partial firearms ban and did not fully restore Caron's firearms rights, "[t]he State has singled out the offender as more dangerous than law-abiding citizens, and federal law uses this determination to impose its own broader stricture." *Caron*, 524 U.S. at 315. Thus, even when the Court determined that the statute required a further federal stricture, it still looked to the convicting state's determination that a person was dangerous enough to warrant imposition of that stricture.

Petitioner's case (although it concerns only the exemption clause) is the other side of the *Caron* coin. Petitioner was not singled out by Wisconsin as "dangerous" as a result of his misdemeanor convictions. Instead, by allowing him to retain his civil rights, the state of Wisconsin determined that, with respect to his worthiness to participate in public life, he was no different than its other law-abiding citizens. For purposes of the exemption clause, Wisconsin's considered decision cannot be wholly dismissed without reinstating an entirely federal framework that Congress plainly rejected. See NRA Br. 19-21. Wisconsin signaled to the federal statute that Petitioner's convictions were not serious enough to qualify as "convictions" because it allowed him to participate in civic life.

II. THE EXEMPTION CLAUSE DOES NOT REQUIRE A SUBSEQUENT ACT OF FORGIVENESS.

Contrary to the obvious substantive inquiry of the exemption clause, Respondent reads it to require an "action" "subsequent" to the conviction that is "specific" and "formal" in "extend[ing] a measure of forgiveness" that relieves him "from the consequences of his conviction." Resp. Br. 15. But this interpretation of the statute is no more tethered to its plain language than Petitioner's. Just as the word "trustworthy" does not appear anywhere in the language of the statute, *id.* at 18, neither do the words "subsequent action"

or "measure of forgiveness" appear anywhere in the statutory language. *Id.* at 15. Further, Respondent fails to acknowledge that most civil rights are "restored" by operation of law, through some distant corner of a statute book that offenders never see, a reality that is distinct from Respondent's conception of a "specific" extension of "a measure of forgiveness" to individual offenders. *Id.*

This Court has already acknowledged that there is no difference between a restoration "by operation of law rather than by pardon or the like." *Caron*, 524 U.S. at 313. Indeed, "[n]othing in the text of § 921(a)(20) requires a case-by-case decision to restore civil rights . . . [w]hile the term 'pardon' connotes a case-by-case determination, 'restoration of civil rights' does not . . . and federal law gives effect to its rule." *Id.* But Respondent clings to its conception that a specific, formal act of forgiveness is required to satisfy the exemption clause. Resp. Br. 14-15. Respondent's argument mirrors the reasoning of the holding of *United States* v. *Ramos*, 961 F.2d 1003, 1006-08 (1st Cir. 1992), *overruled by United States* v. *Indelicato*, 97 F.3d 627 (1st Cir. 1996), which the Second Circuit relied upon in *McGrath* v. *United States*, 60 F.3d 1005 (2d Cir. 1995). It stated: "[t]he point is not just that civil rights were never lost, but that, following conviction, such rights were *affirmatively 'restored.'*" *Ramos*, 961 F.2d at 1008 (emphasis added). However, the First Circuit subsequently overruled *Ramos* in *Indelicato*. No circuit has adopted *Ramos*' reasoning. For example, in rejecting the *Ramos* line of reasoning, the Fifth Circuit commented

> the First Circuit [in *Ramos*] flatly requires an 'affirmative[] restor[ation]' of civil rights if the defendant is to come within the ambit of § 921(a)(20); that court simply refuses to address the rhetorical question 'how could a jurisdiction ever "restore"' civil rights to a felon or misdemeanant whose rights were never forfeited?

United States v. *Thomas*, 991 F.2d 206, 212 (5th Cir. 1993) (footnote omitted). The Fifth Circuit continued,

> '[i]f Congress intended to require an individual affirmative act of restoration by the state, Congress could have so provided.'. . . we find ourselves unable to embrace an interpretation that results in convicting a person under § 922(g) who has never lost his civil rights and who is not prohibited by the state from possessing a gun.

Id. (quoting *United States* v. *Gomez*, 911 F.2d 219, 221 (9th Cir. 1990)). Thus, § 921(a)(20) does not require any affirmative act of forgiveness. Any argument to the contrary has been dismissed by every circuit addressing the issue since *Indelicato*.

States have numerous methods by which they may render prior convictions beyond the reach of the enhancement statute. Section 921(a)(20) itself lists pardoning, expunction and restoration of rights as three options. Respondent suggests that what unites these three (and, by corollary, what makes retained rights different) is that the convicted felon becomes the subject of an "act of forgiveness" on the part of the state. But to differentiate between restoration and retention because the former supposedly involves an affirmative act is to ignore the reality of the restoration process. Each of these methods for dealing with these civil rights issues reflects considered and careful judgments about trustworthiness, public safety, and forgiveness in the context of different offenses. It is neither respectful of these judgments nor fair to cleave an artificial distinction between a subsequent act of forgiveness (*i.e.*, restoration) and an original or affirmative act of forgiveness (*i.e.*, retention). Retention of civil rights is just as much an act of forgiveness as is restoration of those rights.

Contrary to Respondent's characterizations, the state does not restore felons' rights through a volitional, case-specific

act. Rather, such rights are restored by a mechanical, *pro forma* operation of law that requires no bureaucratic inputs from the state. Often, civil rights are automatically restored after a statutorily specified number of years have elapsed, without any affirmative act by either the state or the convict. Thus, a broad legislative determination that persons who commit certain crimes nevertheless deserve to retain their civil rights is just as much an "affirmative act" as is automatic restoration of them after they have been deprived. Respondent's mischaracterization of this process is convenient but disrespects the state's choice with regard to how the civil rights of felons should be handled. To describe restoration as an "act" is to attach a label that gives the process more significance that it actually entails. Accordingly, each of respondent's attempts to give definition to what is meant by "restoration" in this context only demonstrates that such definitions are artificial and neither reflect nor respect what the States have done.

Respondent's assertion that a meaningful difference exists between restoration by operation of law and retention by operation of law fails for additional reasons. Certainly, Respondent must agree that in order to satisfy the exemption clause's restoration of civil rights provision, an offender must *possess* all three civil rights after conviction. It insists that at least two civil rights must be taken away and restored in order for the exemption to operate. Resp. Br. 12-13. Yet, if only two civil rights are taken away and restored and the third civil right was not taken away then Respondent's reading of the exemption clause would conclude that right has not been "restored." Respondent agreed in *Caron*, however, either explicitly or implicitly, that two rights restored and one retained was sufficient to allow the prior conviction to fall within the exemption clause. *Caron*, 524 U.S. at 313. Beyond this inconsistency, Respondent offers no explanation as to why two rights must be restored rather than one or three. Further, it is not entirely clear which rights are either removed

or retained. Some may be suspended, for example, when an offender is incarcerated. "Suspended" is defined as: "to cause to stop for a period; interrupt. . . to render temporarily ineffective." *American Heritage Dictionary of the English Language* (4th ed. 2004). Suspended rights, therefore, are not "lost" or "taken away", so they cannot be restored under Respondent's interpretation. See Resp. Br. 10-11.

As another example, offenders in Wisconsin like Petitioner, do not lose their right to serve on a jury. While incarcerated, however, Petitioner certainly loses that right in a practical sense. Of course, when Petitioner finished his term of incarceration he could both formally and practically serve on a jury. Respondent argues that the restoration must "relieve[] [the offender] of some or all of the consequences of his conviction." *Id.* at 14. Clearly, one consequence of being incarcerated, even if the right to serve on a jury is technically retained, is that an offender cannot practically serve on a jury. Respondent's reading of the statute would preclude a finding of restoration in this practical sense as well, even though it may well satisfy dictionary definitions. *Id.* at 10-11.

III. ABSURD RESULTS

Respondent further contends that Petitioner's position would produce anomalous results where offenders who might have committed more serious crimes retain their civil rights by operation of law and are therefore exempted. Yet, Respondent concedes that its own position produces anomalous results because individuals who have committed more serious crimes than Petitioner may nonetheless have their rights restored, whereas misdemeanants who never lost their rights must suffer enhanced sentencing. Resp. Br. 27. Such unfairness is not just irregular, but wholly incongruous and unreasonable, especially in light of Congress's obvious effort to respect the states' peculiar decisions as to how to handle offenders and their civil rights. Respondent therefore mischaracterizes the issue as a matter of "choos[ing] one anomaly over another," *id.* at 8, 31, when the only choice is to

avoid an absurd result stemming incomplete drafting in an otherwise complicated statutory scheme. At bottom, Respondent's "choice of anomalies" inevitably disregards the state's decision not to strip Petitioner of any civil rights; instead, it confers upon him the federal status of violent offender.

Respondent attempts to undermine Petitioner's absurdity claim by arguing that its own potential anomaly would arise in only three states. Resp. Br. 30. Interestingly, Respondent does not include Wisconsin on that list, ostensibly for the reason that Wisconsin no longer has misdemeanors punishable for more than two years. Therefore, no current misdemeanor can qualify as a predicate under § 921(a)(20)(B).[1] But this change does not benefit Petitioner. Respondent fails to recognize that the ACCA reaches back to convictions without a time limit. Therefore, while a state's current law may not lead to absurd consequences under the federal statute, its prior laws might. Indeed, this is precisely why Petitioner is before this Court. While waiting periods for firearms reinstatements of 10 or 15 years may seem distant to Respondent, Petitioner's convictions are nearly 20 years in the past and certainly still matter for ACCA purposes. In addition, Respondent cites the rationale from *McGrath* that under Petitioner's interpretation

> the most dangerous felons in a state that elected not to forfeit civil rights would be exempted from the federal prohibition, while those convicted of far less serious

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[1] Wisconsin amended its laws in 2001, whereby under current law Petitioner's prior convictions would be punishable by only two years, not three years, thereby disqualifying those offenses under the federal law. Despite the government's implication to the contrary, Wisconsin's revisions of its laws had nothing to do with being mindful of the federal statute, but instead were amended under a "truth-in-sentencing" reform. *See* Wis. Stat. § 939.62(1)(a) (2001), *amended by* Wis. Act. 109 (S.B.1), § 562 (eff. Feb. 1, 2003).

> crimes in other states would not be exempted unless they were lucky enough to receive the benefits of an act of grace.

McGrath, 60 F.3d at 1009. Respondent's argument misses the point. In essence, Respondent argues that Petitioner's interpretation creates the anomaly that serious offenders in one state do not lose civil rights, while less serious offenders in another state do.[2] But anomalies from state to state are irrelevant. Indeed, disparities from state to state are inherent in a system that is based on federalism and deference to state choices respecting civil rights and offenders. What is relevant is whether federal law creates an absurdity *within* a particular state, as it does here. To be sure, such absurdities will arise in all states where civil rights are retained by offenders whose crimes fall within the technical definition of a violent felony (*e.g.*, a misdemeanor with a maximum sentence of more than 2 years). See generally NACDL Brief. Most importantly, any "anomalies" created by the common sense application of FOPA's exemption clause, at the very least, respect a state's determination that, despite a conviction, an offender is trustworthy enough to participate fully in civic life, and possess all firearms under state law.

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[2] Respondent observes that all offenders in Maine retain their civil rights and asserts that Petitioner's interpretation creates an anomaly because no Maine felonies could qualify as predicate crimes. Resp. Br. 31. The assertion is inaccurate because felons and any offender in Maine (whether misdemeanant or felon) who uses a dangerous weapon during the offense loses their firearm rights. NACDL App. 1, at 23. The "unless" clause, and Caron's reading of that clause, makes all such convictions qualifying predicates. Accordingly, Petitioner's interpretation creates no serious anomaly and, unlike Respondent's interpretation, preserves respect for the state determination as to how offenders should be treated with regard to their civil rights.

IV. CONGRESS DID NOT CONSIDER THE UTILITY OR DISUTILITY OF EXCLUDING RIGHTS RETAINED FROM THE EXEMPTION CLAUSE.

Petitioner argues that the statute and the legislative history are silent as to how to treat convictions for which civil rights were retained. Respondent counters that "a law cannot be judicially amended because Congress did not confirm its plain meaning in legislative history." Resp. Br. 8. Yet, in a similar context Congress had not confirmed the plain meaning of "in any court" in the legislative history at issue in *Small*. The Court nonetheless found significance in the silence and determined that it had "no reason to believe that Congress considered the added enforcement advantages flowing from inclusion of foreign crimes." *Small*, 544 U.S. at 394. It based its conclusion in part because the "lengthy legislative history confirms the fact that Congress did not consider whether foreign convictions should or should not serve as predicate to liability under the provision here at issue." *Id.* at 393. The Court added that "those who use legislative history to help discern congressional intent will see the history here as silent, hence a neutral factor, that simply confirms the obvious, namely, that Congress did not consider the issue." *Id.* Thus, the fact that Congress had not confirmed the plain meaning of "in any court" in the legislative history supported the Court's conclusion that it should narrowly interpret the application of the statute.

Petitioner similarly asks the Court to interpret 18 U.S.C. § 921(a)(20) narrowly so that crimes are not included as predicates where Congress plainly gave no consideration as to whether they should. Just as there was no reason to believe Congress considered the inclusion of foreign convictions in *Small*, there is no indication here that Congress considered excluding from the exemption clause convictions for which civil rights were retained.[3] FOPA's explicit abrogation of

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[3] The First Circuit has so noted:

Dickerson v. *New Banner Inst., Inc.*, is, however, evidence that Congress intended a broad reading of the exemption clause, and, thus, a narrow reading of what qualifies as a predicate conviction. 460 U.S. 103 (1983), *superseded by statute*, 18 U.S.C. § 921, *as recognized in Caron* v. *United States*, 524 U.S. 308 (1998). And when the history of a statute reveals that "an unthinkable [result] was indeed unthought of," the Court should avoid applying the statute in a way that attributes to Congress an absurd conclusion. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (internal parenthetical omitted).

V. THE PURPOSE OF FOPA COUNSELS INCLUSION OF RIGHTS RETAINED IN THE EXEMPTION CLAUSE.

FOPA's abrogation of *Dickerson* further illuminates the absurdity of excluding rights retained from the exemption clause. In reaching its decision in *Caron* as to whether a partial state gun ban satisfied the unless clause, the Court acknowledged that "either reading [of whether the unless clause is satisfied by a state's partial gun ban] creates incongruities," but that *Caron*'s approach yielded "results contrary to a likely, and rational, congressional policy." 524 U.S. at 315. Here, the likely and rational congressional policy is known. Congress enacted FOPA in part because the

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> The incidents that gave rise to the amendment (in particular, *Dickerson*), and what Congress thought to be the ordinary case, involved the deprivation of civil rights and their subsequent restoration (*e.g.*, by pardon). Indeed, there is no indication in the legislative history that Congress gave any attention to the rare case in which someone convicted of a serious crime would not lose one or more of the three civil rights that have been used by most courts as touchstones under this section.

Indelicato, 97 F.3d at 629. That Congress was operating on the assumption that civil rights are lost by offenders in all cases finds support in Senator Sasser's comments during debate that convicted felons "lose most civil rights-to vote, hold office, and so on . . . ." 131 Cong. Rec. S9101-05 (daily ed. July, 9 1985).

Court's decision in *Dickerson* held that a state expunction did not erase a conviction for purposes of serving as a predicate conviction for federal law. 460 U.S. at 106. Congress thus ensured that "convicted felon" status would turn on state law. To achieve that end, FOPA amended the gun statutes by enacting the current language in § 921(a)(20). In *Caron*, the Court avoided the bizarre result of ignoring a state's determination that a person could not possess a firearm and therefore presented more risk than other law-abiding citizens. 524 U.S. at 317. Similarly, the Court here should not ignore a state's determination that an offender is worthy of participating in civic life. Respondent's position, however, would have the Court do just that — without support from the legislative history and in the face of this Court's prior readings of this statute. Respondent's reading amounts to an attempt to return to a *Dickerson*-ian world that no longer exists.

VI. THE PARENTHETICAL LANGUAGE IN § 921(a)(33)(B)(ii) SUPPORTS THE CONCLUSION THAT RIGHTS RETAINED MUST BE INCLUDED IN THE EXEMPTION CLAUSE.

Respondent is critical of Petitioner's argument that the parenthetical language of § 921(a)(33)(B)(ii) should yield different results than the language of §921(a)(20). Respondent contends that the canon that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that it acts intentionally and purposely in the disparate inclusion or exclusion," *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (internal citation omitted), "applies only where the two sections are parts of 'the same Act.'" Resp. Br. 20. Yet, in *Small*, Respondent relied upon the very same principle in *Russello* "to interpret parallel provisions of the gun control law," provisions of law passed by different Congresses; the very same principle it now argues Petitioner may not invoke. See Br. for United States at 13, *Small* v.

United States, 2004 WL 1844488, No. 03-750 (U.S. Aug. 16, 2004). Indeed, the parenthetical language in the § 921(a)(33) exemption must be given some effect. Otherwise, its additional language is superfluous and void. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 29-30 (1997). The Court must "refrain from concluding here that the differing language in the two subsections has the same meaning in each." *Barnhart* v. *Sigmon Coal, Co.*, 534 U.S. 438, 454 (2002) (internal citation omitted).

Respondent offers that Congress may have intended the parenthetical language of § 921(a)(33) to "*clarify* the meaning of 'restored' in the new statute, not to change the meaning of that term in the earlier statute, which Congress did not amend." Resp. Br. 21. This assertion is perplexing on a number of levels. First, in arguing that the obvious import of the parenthetical language of § 921(a)(33) is to clarify the meaning of § 921(a)(20), Respondent strongly suggests that the meaning of the exemption clause in § 921(a)(20) was in need of clarification. Such an argument wholly undercuts Respondent's claim that the language of the statute is plain in all contexts. Second, Respondent acknowledges that Congress did not amend § 921(a)(20)'s exemption clause when it enacted § 921(a)(33). *Id.* at 21. Yet, Congress is presumed to be aware at the time it enacted the Lautenberg Amendment in 1996 (which added § 922(g)(9) and § 921(a)(33) to the gun statutes) that courts such as *Thomas* and *United States* v. *Cassidy*, 899 F.2d 543 (6th Cir. 1990) were interpreting (a)(20) to exempt convictions for which civil rights were retained. It took no action to clarify (a)(20), even though it could have done so by adding the same parenthetical language of (a)(33) to the exemption clause of (a)(20). If, in 1996, Congress thought that (a)(20)'s exemption clause excluded rights retained, then the parenthetical language in (a)(33) would have been unnecessary. By declining to amend (a)(20), Congress placed its imprimatur on Petitioner's interpretation of the exemption clause.

Moreover, despite the proximity and nearly identical language of §§ 921(a)(20) and (a)(33), the two provisions serve two very different purposes. Section (a)(20) defines a predicate offense for §§ 922(g)(1) and 924(e)(1). It applies equally to violent and non-violent felonies and misdemeanors punishable by more than two years. Other than subsection (A), which excludes certain white collar offenses, (a)(20) is non-specific as to the nature of the offense. In stark contrast, (a)(33) applies specifically and exclusively to misdemeanor crimes of domestic violence, a very particularized subset of misdemeanor offenders whom Congress sought to bar from possessing firearms when it enacted the 1996 Lautenberg Amendment, as Senator Lautenberg stated in debate: "This amendment would . . . keep guns away from violent individuals who threaten their own families." 142 Cong. Rec. S10377-01, S10377-78 (daily ed. Sept. 12, 1996). Congress recognized that, unlike offenses typically included within (a)(20)'s reach for which offenders usually lost their civil rights, misdemeanor crimes of domestic violence were usually only punishable by one year or less and did not typically involve the loss of civil rights. If, in 1996, Congress presumably was apprised of interpretations of (a)(20)'s exemption clause that included rights retained, it was necessary for Congress to include in (a)(33) the explicit parenthetical language in order for all domestic violence convictions to qualify. On the other hand, given that (a)(20) applies generally to all types of felonies and misdemeanors punishable by more than two years, it is rational for Congress to have left (a)(20) as it was and with an understanding that the exemption clause encompassed convictions for which rights were retained.[4] In light of *Thomas*, *Cassidy* and other

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[4] In addition, predicate offenses resulting from the aggressive nature of (a)(33)'s explicit exclusion of convictions for which rights were retained are not used for the severe penalties of § 924(e)(1). Only convictions that meet the definition of (a)(20) may be used to impose mandatory minimum sentences of 15 years. This also counsels in favor of a careful reading of

similar decisions prior to 1996, Respondent's suggestion that Congress appended the parenthetical language to (a)(33) in order to clarify (a)(20) is untenable. The only plausible interpretation of this history is that Congress declined to clarify (a)(20) to abrogate these decisions, but made certain they would not reach (a)(33).

CONCLUSION

For the forgoing reasons, the Court should reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this case for further proceedings consistent with the Court's opinion.

(a)(20) based upon Congress' opposing purposes of FOPA compared to the Lautenberg Amendment.

Respectfully Submitted,

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